

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAMMY VASQUEZ,

No C 06-4540 VRW

Plaintiff,

v

ORDER

MICHAEL J ASTRUE, Commissioner of
Social Security,

Defendant.

_____/

Plaintiff Sammy Vasquez appeals from a decision by the Social Security Administration (SSA) Office of Hearings and Appeals denying his applications for disability benefits. The administrative law judge (ALJ) determined that plaintiff did not satisfy the definition of "disabled" under Titles II and XVI of the Social Security Act. Before the court are cross-motions for

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1 summary judgment on whether the ALJ's determination that plaintiff
2 is not disabled should stand. Based on a careful review of the
3 administrative record and the applicable law, the court DENIES
4 plaintiff's motion and GRANTS defendant's motion.

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6 I

7 A

8 Plaintiff is a forty-six-year-old male with a history of
9 diabetes mellitus and hypertension. AR 288. Plaintiff has a high-
10 school education, AR 18, but, according to his attorney, is "barely
11 literate." AR 442. Plaintiff worked as a window installer from
12 1974 to 2001. AR 149.

13 In January 2001, plaintiff sustained an injury from a
14 fall which resulted in a fracture of his right shoulder. AR 370.
15 A computed tomography (CT) scan of plaintiff's shoulder in April
16 2001 showed a fracture of his shoulder bone into small fragments.
17 AR 385. Subsequent examination revealed delayed healing; plaintiff
18 underwent surgery to repair his shoulder in August 2001. AR 380-
19 84. Plaintiff was later examined by two consulting physicians: Dr
20 Calvin Pon, an orthopedic specialist, in April 2002 and Dr Jaskaran
21 Momi, an internal medicine specialist, in November 2003. Both
22 doctors reported decreased range of motion in plaintiff's right
23 shoulder, but noted that the injuries should not affect plaintiff's
24 ability to perform fine and gross manipulative tasks with both
25 hands. AR 241, 291.

26 In addition to the shoulder injury, plaintiff also
27 suffered a spider bite on his left foot, leading to a serious
28 infection requiring multiple surgeries, called debridements, to

1 remove infected material from the wound, AR 207, 211, 213, followed
2 by a skin graft. AR 202-04. In his April 2002 examination, Dr Pon
3 noted that while the left calf had atrophied due to the injury,
4 plaintiff should be able "to stand and/or walk for a total of six
5 hours during an eight-hour work day." AR 241.

6 In 2003, plaintiff suffered a fracture to the first digit
7 of his right foot. The fracture did not heal, and because of a
8 preexisting ulcer and gangrene on the sole of the right foot,
9 plaintiff underwent amputation of the first, fourth and fifth toes
10 in June 2003. AR 271, 288. Plaintiff testified that the ulcer and
11 gangrene formed when he cut his foot helping his landlord fill a
12 swimming pool. AR 480. Slow healing, infections and ulcers
13 leading to amputation commonly result from injuries suffered by
14 diabetics, especially from injuries of the foot. Plaintiff's
15 diabetes may have complicated the foot injuries.

16 Unfortunately, the list of plaintiff's injuries continues.
17 In July 2003, an x-ray revealed another fracture of his right foot
18 caused, according to plaintiff, by a taxicab running over his foot.
19 AR 331. This fracture healed fully. AR 318, 328.

20 In November 2003, plaintiff saw consulting psychiatrist
21 Dr Jasdeep Aulakh in connection with his application for benefits.
22 AR 283. Dr Aulakh found that plaintiff suffered from depression,
23 but his mental examination "revealed no evidence of cognitive
24 deficits, perceptual disturbances or delusional disorders at this
25 time." AR 287. It must be noted that Dr Aulakh's report refers to
26 plaintiff throughout as a female. See, for example, AR 283 ("The
27 claimant is a 43 year-old-divorced female"); AR 284 ("She stated
28 that she continues to have trouble focusing and feels she has

1 problems with her memory and is easily forgetful"). This error may
2 be clerical, but it raises questions concerning the accuracy of the
3 examination.

4 Plaintiff was unemployed from 2001 forward. AR 466.
5 Plaintiff lived for a period with his former girlfriend, Sharon
6 Bailey, who wrote in a third-party function report that plaintiff
7 was depressed because he "can't work anymore, [h]e can't go
8 fishing, can't run or jog, can't throw a ball." AR 163. Bailey's
9 report further stated that plaintiff "can't walk very far" and "has
10 severe pain in feet and legs they jerk and spasm most of the
11 night," AR 159, but he was capable of performing "a little
12 cleaning, cooking, laundry." AR 160.

13 At one point in the relationship, a restraining order was
14 filed against plaintiff to stay away from Bailey. AR 475.
15 Plaintiff testified at his hearing that he was arrested for
16 violating the restraining order and served four months in prison.
17 Id. Plaintiff offered the improbable explanation that the
18 restraining order had been lifted prior to the violation, but that
19 it was not processed, resulting in his prison term. Id.

20 At the hearing plaintiff told the ALJ he was living with
21 friends and was no longer in a relationship with Bailey. AR 465,
22 476. Per his testimony, plaintiff's social life consisted of going
23 to the movies and seeing friends and he spent most of his time
24 working on crossword puzzles and building model cars. Id. AR 483.

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26 B

27 In May 2003, plaintiff filed an application for
28 supplemental security income benefits (SSI). AR 89. In August of

1 that same year, plaintiff also filed an application for disability
2 insurance benefits (DIB), alleging disability beginning January 25,
3 2001. AR 155. Both applications were denied initially and on
4 reconsideration. AR 32, 41.

5 Plaintiff timely requested a hearing before an
6 administrative law judge (ALJ). AR 46. The initial hearing was
7 held August 25, 2005, but plaintiff was not present because he was
8 unable to obtain transportation. AR 440-41. The hearing proceeded
9 without him, and the ALJ heard testimony from vocational expert
10 (VE) Malcolm Brodzinsky. AR 447-9. The ALJ posed the following
11 hypothetical to the VE:

12 Assume an individual who would have difficulty
13 doing any work that would require balancing. No
14 walking on uneven ground. No standing more than
15 an hour at a time or more than six hours in a
16 work day. No walking more than ten to 15 minutes
at a time, two hours in a work day. No lifting
over 20 pounds maximum and ten pounds
repetitively, and no lifting over 10 pounds with
the right arm.

17 AR 446. The VE then testified that there were a number of sedentary
18 occupations which were suitable for plaintiff. AR 447-49. These
19 occupations included ticket seller, small parts assembler, counter
20 clerk in photography finishing, order clerk in the food and beverage
21 industry and telephone price quotation clerk. Id.

22 The ALJ observed that plaintiff was not taking his
23 prescribed medication and questioned how much one can "believe from
24 somebody who's not complying with his medications anyway." AR 459.
25 Plaintiff's attorney responded that plaintiff received his
26 medication while in prison, but that he had problems getting his
27 medication while out of prison. Id. The attorney noted that
28 plaintiff had a "chaotic family life." AR 440.

1 The ALJ informed plaintiff's attorney that it "would be
2 hard to find in his favor without his testimony." AR 442.
3 Plaintiff's attorney requested a second hearing and the ALJ agreed.
4 AR 459-60. On September 15, 2005, the ALJ granted plaintiff a
5 further hearing, which was held on October 17, 2005. Plaintiff
6 appeared and testified. AR 74, 461.

7 At the hearing, plaintiff testified that: he could only
8 walk three blocks before he had to stop to rest and elevate his feet
9 due to pain and numbness (AR 468); a doctor-prescribed metal cane
10 assisted his walking (AR 478); he could only stand for about a half-
11 hour at a time (id); and after sitting for ninety minutes he
12 experienced numbing and tingling in his feet and "jerking" of his
13 legs and to stop it he had to stand or elevate his feet. AR 469,
14 476. Plaintiff also testified that he experienced numbness in his
15 hands and fingers affecting his ability to grip objects, explaining
16 that he could use a knife to cut objects for nearly twenty minutes,
17 at which point he had to stop to rub his hands, typically regaining
18 feeling after thirty minutes. AR 484-86. Further, plaintiff stated
19 that upon awakening his hands felt numb and cramped into a "claw
20 like" grip, which his doctor had attributed to either diabetes or
21 arthritis, and that the numbness sometimes affected his ability to
22 use a pen, but not his ability to hold a telephone AR 486-87.
23 Plaintiff testified that his doctor prescribed him pain medication
24 for pain in his shoulder and legs and that he also took medication
25 for diabetes, blood pressure and pain. AR 471.

26 On January 27, 2006, the ALJ issued an eight-page ruling
27 denying plaintiff's applications for both SSI and DIB. AR 17-24.
28 To determine whether plaintiff was entitled to benefits, the ALJ

1 conducted a five-step sequential evaluation of plaintiff's
2 disability, which considered the following: (1) whether plaintiff
3 was currently engaged in substantial gainful activity (SGA); (2)
4 whether plaintiff had a "severe" impairment or a combination of
5 impairments; (3) if plaintiff had a severe impairment, whether
6 plaintiff had a condition which met or equaled the conditions
7 outlined in the listing of impairments at 20 CFR Part 404, Subpart
8 P, Appendix 1; (4) if plaintiff did not have such a condition,
9 whether plaintiff was capable of performing his past work; and (5)
10 whether plaintiff had the residual functional capacity (RFC) to
11 perform any other work that exists in substantial numbers in the
12 economy. 20 CFR § 404.1520; 20 CFR § 416.920. Plaintiff bears the
13 burden to prove disability in steps one through four. At step five,
14 the burden shifts to the SSA to establish that plaintiff "can
15 perform a significant number of other jobs in the national economy."
16 Thomas v Barnhart, 278 F3d 947, 955 (9th Cir 2002).

17 At step one, the ALJ found that plaintiff had not engaged
18 in substantial gainful activity after August 25, 2001. AR 18.

19 At step two, the ALJ found that plaintiff's diabetes, foot
20 injuries, amputation of the right foot and right shoulder fracture
21 "significantly limit his abilities to perform basic work activities,
22 as set forth at 20 CFR 404.1521 and 416.921, and must be deemed to
23 be 'severe.'" AR 19. The ALJ found plaintiff's high blood pressure
24 and depression "not severe." AR 19.

25 At step three, the ALJ concluded that plaintiff's "severe"
26 impairments did not equal "in severity and duration to any Listed
27 findings." AR 20. The ALJ found that plaintiff did not meet
28 Listing 1.02 because plaintiff's impairments "do not describe gross

1 anatomical deformity in a joint with chronic pain * * * resulting in
2 an inability to perform fine and gross movements effectively or
3 resulting in inability to ambulate effectively * * *." Id. The
4 reports by both Dr Momi and Dr Pon indicated that plaintiff could
5 perform fine and gross movements with both hands effectively. AR
6 21. The ALJ also found the partial amputation of plaintiff's right
7 foot did not meet Listing 1.05 because that listing requires
8 amputation of "both hands or one or both lower extremities." Id.

9 The ALJ then proceeded to step four. Through
10 consideration of medical evidence, plaintiff's testimony and
11 evidence from Bailey, the ALJ found plaintiff able to perform
12 sedentary work because he was capable of "standing for thirty
13 minutes at a time, walking three blocks at a time, lifting ten
14 pounds frequently and twenty pounds occasionally, lifting no more
15 than ten pounds with the right arm and no overhead lifting with the
16 right arm." AR 22. On this basis, the ALJ found that plaintiff's
17 RFC made it impossible for him to perform his past jobs and
18 proceeded to step five. Id.

19 At step five, the ALJ found, based on the testimony of the
20 VE, that plaintiff could perform the job of order clerk or telephone
21 quote clerk, both of which exist in large numbers in the national
22 economy. AR 23. For this reason, the ALJ found that plaintiff was
23 not disabled. AR 23-24.

24 Plaintiff unsuccessfully requested review of the ALJ's
25 decision from the SSA's Appeals Council. AR 7. On July 26, 2006,
26 plaintiff timely filed his complaint seeking judicial review of the
27 ALJ decision under 42 USC § 405(g).

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II

A district court may only overturn a decision to deny benefits only if the decision is not supported by substantial evidence or if the decision is based on legal error. 42 USC § 405(g); Andrews v Shalala, 53 F3d 1035, 1039 (9th Cir 1995). *Id.* The Ninth Circuit defines substantial evidence as more than "a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." "Substantial evidence is relevant evidence which, considering the record as a whole, a reasonable person might accept as adequate to support a conclusion." Thomas v Barnhart, 278 F3d at 954. The decision of the ALJ should be upheld if the evidence is "susceptible to more than one rational interpretation." Andrews, 53 F3d at 1040. The determination whether substantial evidence supports the ALJ's decision is based on the administrative record as a whole. Andrews, 53 F3d at 1040. Determinations of credibility, resolution of conflicts in medical testimony and all other ambiguities are to be resolved by the ALJ. Magallanes v Bowen, 881 F2d 747, 750 (9th Cir 1989).

III

Plaintiff presents five issues on this appeal. Plaintiff contends that: (1) the ALJ erred by not finding that his impairments equaled Listing 1.02 in the Listing of Impairments; (2) the ALJ improperly discounted the subjective symptoms of pain and numbness that plaintiff reported; (3) the ALJ's determination that plaintiff was not impaired for a continuous twelve-month period was not supported by substantial evidence; (4) the ALJ's findings on

1 plaintiff's RFC were not supported by substantial evidence; and (5)
2 the SSA did not establish the existence of other jobs plaintiff
3 could perform because the ALJ posed an incorrect hypothetical to the
4 VE. Doc #10 at 5-10.

6 A

7 Plaintiff argues that the ALJ did not make specific
8 findings as to whether plaintiff's impairments equaled Listing 1.02,
9 Disorders of the Musculoskeletal System, as required by 20 CFR §
10 404.1520. Doc #10 at 5. To determine medical equivalence, the ALJ
11 compares the medical findings to the Listing of Impairments to
12 determine if the combination of medical impairments is "at least of
13 medical equivalence to those of a listed impairment." 20 CFR §
14 404.1526. If there is substantial evidence to support the ALJ's
15 determination that plaintiff's impairments do not equal a listed
16 impairment, the ALJ is not required to "state why a claimant failed
17 to satisfy every different section of the listing of impairments."
18 Gonzalez v Sullivan, 914 F2d 1197, 1200 (9th Cir 1990).

19 Plaintiff relies upon Marcia v Sullivan, 900 F2d 172 (9th
20 Cir 1990) to support his contention. In Marcia, the court found
21 insufficient ALJ's findings on medical equivalence because the ALJ
22 only wrote: "The claimant has failed to provide evidence of
23 medically determinable impairments that meet or equal the Listings *
24 * *." Id at 176. The court held that the ALJ "must explain
25 adequately his evaluation of alternative tests and the combined
26 effects of the impairments." Id.

27 In this case, plaintiff points to the ALJ's finding that
28 plaintiff's medical findings in the record are "not equal in

1 severity and duration to any Listed findings" (AR 20), asserting
2 that it does not meet Marcia's requirement that the ALJ make
3 specific findings on medical equivalence. Doc #10 at 5. This
4 argument fails for three reasons.

5 First, in order to establish that his impairments equal a
6 listed impairment, plaintiff bears the burden of producing evidence
7 that offers a theory — plausible or otherwise — as to how his
8 impairments equal a listed impairment. Lewis v Apfel, 236 F3d 503,
9 514 (9th Cir 2001). Unlike the claimant in Marcia, plaintiff has
10 not advanced a theory as to how or why his impairments equal a
11 listed impairment. Merely providing some medical evidence does not
12 shift the burden to the ALJ to determine medical equivalence.

13 Second, the ALJ's decision indicates a careful and
14 complete consideration of the evidence before him. The ALJ made
15 findings throughout the decision that would support the conclusion
16 that plaintiff's impairments did not equal a listed impairment.
17 While Marcia requires that the ALJ make specific findings on the
18 evidence, it does not require that the findings appear under any
19 specific heading, but simply guards against summary conclusions.
20 See, e g, Lewis, 236 F3d at 513 (holding that Marcia "simply
21 requires an ALJ to discuss and evaluate the evidence that supports
22 his or her conclusion; it does not specify that the ALJ must do so
23 under the heading 'Findings'").

24 Finally, plaintiff's medical records offer substantial
25 evidence to support the ALJ's determination that plaintiff's
26 impairments are not equivalent to Listing 1.02. To equal Listing
27 1.02, the claimant must be unable to ambulate effectively or perform
28 fine and gross movements. 20 CFR § 404, Pt 404, Subpt P, App 1, §

1 1.00(B)(2)(a). The Listing defines "ineffective ambulation" as:

2 * * * extreme limitation of the ability to walk
3 * * *. Ineffective ambulation is defined
4 generally as having insufficient lower extremity
5 functioning (see 1.00J) to permit independent
ambulation without the use of a hand-held
assistive device(s) that limits the function of
both upper extremities.

6 20 CFR Pt 404, Subpt P, App 1, § 1.00(B)(2)(b)(1). Examples of
7 ineffective ambulation in the Listing include: inability to walk on
8 uneven or rough surfaces, walk at least one block or walk without a
9 walker, two crutches or two canes. 20 CFR § 404, Pt 404, Subpt P,
10 App 1, § 1.00(B)(2)(b)(2). Dr Pon's uncontradicted report concluded
11 that plaintiff could sit or stand for six hours per day, lift ten
12 pounds with his right upper extremity and could perform unlimited
13 fine and gross manipulations. AR 239-41. Plaintiff's doctor
14 prescribed a metal cane to assist his walking. AR 478. By
15 plaintiff's own testimony, he can walk three blocks before needing
16 to rest and uses only one cane. AR 468. These facts do not support
17 a finding that plaintiff cannot ambulate effectively.

18 The Listing offers as examples of inability to perform
19 fine and gross movements "the inability to prepare a simple meal and
20 feed oneself, the inability to take care of personal hygiene, the
21 inability to sort and handle papers or files, and the inability to
22 place files in a file cabinet at or above waist level." 20 CFR §
23 404, Pt 404, Subpt P, App 1, § 1.00(B)(2)(c). Both examining
24 physicians reported that plaintiff can perform fine and gross
25 movements. AR 241, 291. Plaintiff built model cars, completed
26 crossword puzzles, did laundry and dishes and prepared meals, AR
27 168, 483—all activities requiring the ability to perform a variety
28 of fine and gross movements.

Based on the above facts, the ALJ's determination that plaintiff's impairments do not equal Listing 1.02 is supported by substantial evidence.

B

Plaintiff contends that the ALJ improperly discounted plaintiff's testimony regarding pain and numbness. Doc #10 at 6. In order to reject plaintiff's subjective complaints, the ALJ must provide "specific, cogent reasons for the disbelief." Rashad v Sullivan, 903 F2d 1229, 1231 (9th Cir 1990). Unless there is affirmative evidence showing that plaintiff is malingering, the ALJ's reasons for rejecting the testimony must be "clear and convincing." Swenson v Sullivan, 876 F2d 683, 687 (9th Cir 1986). General findings are insufficient; the ALJ must identify which testimony is not credible and what evidence undermines the subjective complaints. Lester v Chater, 81 F3d 821, 834 (9th Cir 1995). The ALJ may consider the following non-exhaustive list of factors when weighing plaintiff's credibility: "[plaintiff's] reputation for truthfulness, inconsistencies either in [plaintiff's] testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which [plaintiff] complains." Light v Social Security Administration, 119 F3d 789, 792 (9th Cir 1997).

The ALJ found plaintiff's testimony regarding the ability to use his hands, and numbness and tingling in his hands and feet not credible. The ALJ relied upon physicians' reports in discounting this testimony. AR 21. Both doctors found that

1 plaintiff could perform gross and fine manipulations with both
2 hands. Id. This determination is supported by substantial evidence
3 in the record, including the doctors' reports and plaintiff's own
4 testimony regarding his daily activities. The ALJ found that there
5 was no evidence in the record separate from plaintiff's own reports
6 to support plaintiff's claim of tingling feet. Id. In any event,
7 it is immaterial whether the claimed numbness or tingling of the
8 feet was deemed credible, because the ALJ believed plaintiff could
9 only walk three blocks before requiring rest anyway. Id.

10 The ALJ also properly discounted plaintiff's assertions of
11 pain. In reaching his conclusion, the ALJ considered medical
12 findings along with "claimant's daily activities, the location,
13 duration, frequency and intensity of the claimant's pain,
14 precipitating and aggravating factors * * *." AR 22. The ALJ also
15 considered reports from the doctors, plaintiff's own testimony, and
16 evidence provided by Bailey. Id. The ALJ made specific findings as
17 to why he found plaintiff's testimony not credible, noting that
18 plaintiff was comfortable sitting and going out socially with
19 friends, working on crossword puzzles, building models and helping
20 with housework. AR 22. The ALJ's decision to discount plaintiff's
21 pain testimony was supported by substantial evidence.

C

24 Plaintiff asserts that the ALJ improperly failed to
25 consider a closed period of disability in 2001-02. Doc #10 at 8.
26 The law requires that the claimant be unable "to do [their] past
27 relevant work or any other substantial gainful work that exists in
28 the national economy" for a period of twelve months. 20 CFR §

1 404.1505(a). Contrary to the ALJ's findings, plaintiff claims that
2 during this period his injuries and the resulting complications made
3 it impossible to work. Plaintiff misreads the ALJ's decision. The
4 ALJ did not find that plaintiff's injuries did not last for a
5 twelve-month period, but rather that, although plaintiff could not
6 perform his past work during the relevant period, his injuries did
7 not preclude all employment; plaintiff was only limited to sedentary
8 work. AR 21-22. In actuality, the ALJ found that plaintiff had met
9 his burden at step four and proceeded to step five.

10
11 D

12 Plaintiff contends that the ALJ's RFC assessment was "not
13 based on all the evidence" and should not withstand review because
14 the ALJ discounted plaintiff's subjective testimony. Doc #10 at 9.
15 But the critical determination is whether the ALJ's decision is
16 supported by substantial evidence, not all of the evidence.
17 Jamerson v Chater, 112 F3d 1064, 1067 (9th Cir 1997). The RFC
18 finding is supported by a long discussion of the available evidence
19 in which the ALJ considered not only medical evidence but also
20 plaintiff's own subjective testimony. AR 20-21. The ALJ found,
21 consistent with the medical evidence and doctors' reports, that
22 plaintiff could stand for "30 minutes at a time, [walk] 3 blocks at
23 a time, [lift] 10 pounds frequently and 20 pounds occasionally * *
24 *." AR 21. Substantial evidence supports this determination.

25
26 E

27 Plaintiff contends that because the ALJ's RFC assessment
28 and the hypothetical posed to the VE were not exactly the same, the

1 SSA failed to meet its burden of proving that there were other types
2 of work available to plaintiff in the national economy. The ALJ's
3 hypothetical asked the VE to identify jobs that required no more
4 than an hour of standing at a time, whereas the ALJ found that
5 plaintiff could stand for no more than thirty minutes. AR 22. Due
6 to this apparent mismatch, plaintiff contends that the SSA failed to
7 meet its burden at step five. Doc #10 at 10.

8 Even though the limitations set forth by the ALJ were not
9 identical to the RFC finding, however, the jobs identified by the VE
10 were unaffected by the discrepancy and the error, if any, was
11 harmless. The VE's testimony identified many types of sedentary
12 work that did not require standing for longer than thirty minutes at
13 a time. AR 447-49. The sedentary work that the VE described
14 allowed for the employee to sit or stand at will, with no
15 requirements as to how long the employee must do either. AR 447.

16
17 IV

18 For the foregoing reasons, the court DENIES plaintiff's
19 motion for summary judgment and GRANTS defendant's motion for
20 summary judgment. The clerk is directed to close the file and
21 terminate all pending motions.

22
23 IT IS SO ORDERED.

24
25 
26 VAUGHN R WALKER
27 United States District Chief Judge
28